

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

AREZOU MANSOURIAN; LAUREN
MANCUSO; NANCY NIEN-LI CHIANG;
CHRISTINE WING-SI NG; and all
those similarly situated,

Plaintiffs,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF CALIFORNIA AT
DAVIS; LAWRENCE VANDERHOEF;
GREG WARZECKA; PAM GILL-
FISHER; ROBERT FRANKS; and
LAWRENCE SWANSON,

Defendants.

NO. CIV. S 03-2591 FCD EFB

MEMORANDUM AND ORDER

-----oo0oo-----

This matter is before the court on plaintiffs Arezou
Mansourian ("Mansourian"), Lauren Mancuso ("Mancuso"), and
Christine Wing-Si Ng's ("Ng") (collectively "plaintiffs") motion
for reconsideration or clarification of a portion of the court's
December 8, 2010 Memorandum & Order. Specifically, plaintiffs
challenge the court's conclusion that plaintiffs' § 1983 claims

1 against the individual defendants arising out of the removal of
2 plaintiffs from the wrestling program and the imposition of
3 defendants' policy requiring women to wrestle-off against men are
4 time barred. Defendants Regents of the University of California
5 (the "University"), Larry¹ Vanderhoef ("Vanderhoef"), Greg
6 Warzecka ("Warzecka"), Pam Gill-Fisher ("Gill-Fisher"), and
7 Robert Franks ("Franks") (collectively "defendants") oppose the
8 motion. For the reasons set forth below,² plaintiffs' motion for
9 reconsideration is DENIED.

10 **STANDARD**

11 Pursuant to Rule 54(b), "any order of other decision,
12 however designated, that adjudicates fewer than all the claims or
13 the rights and liabilities of fewer than all the parties does not
14 end the action as to any of the claims or parties and may be
15 revised at any time before the entry of a judgment adjudicating
16 all the claims and all the parties' rights and liabilities."
17 Where reconsideration of a non-final order is sought, the court
18 has "inherent jurisdiction to modify, alter or revoke it."
19 United States v. Martin, 226 F.3d 1042, 1048-49. (9th Cir. 2000).
20 To succeed in a motion to reconsider, a party must set forth
21 facts or law of a strongly convincing nature to induce the Court
22 to reverse its prior decision. See, e.g., Kern-Tulare Water
23 Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal.

24
25
26 ¹ Defendants assert that defendant Larry Vanderhoef was
erroneously sued as Lawrence Vanderhoef.

27 ² Because oral argument will not be of material
28 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. L.R. 230(g).

1 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d
2 514 (9th Cir. 1987).

3 Generally, and absent highly unusual circumstances,
4 reconsideration is appropriate only where (1) the party presents
5 the court with newly discovered evidence, (2) the court committed
6 clear error or the initial decision was manifestly unjust, or (3)
7 there is an intervening change in controlling law.³ See Sch.
8 Dist. No. 1J, Multnomah County, Oregon v. ACANDS, Inc., 5 F.3d
9 1255, 1263 (9th Cir. 1993).

10 **ANALYSIS⁴**

11 On December 18, 2003, plaintiffs filed the instant action on
12 behalf of themselves and a putative class, asserting six claims
13 for relief: (1) violation of Title IX based on unequal
14 opportunities; (2) violation of Title IX based on unequal
15 financial assistance; (3) retaliation in violation of Title IX;
16 (4) violation of 42 U.S.C. § 1983; (5) violation of the
17 California Unruh Civil Rights Act; and (6) violation of public
18 policy. After numerous motions and orders, including review and
19 remand by the Ninth Circuit, there remain two claims for relief
20 for trial: (1) a claim by individual plaintiffs against the
21 University for violation of Title IX arising out of the alleged
22 failure to provide equal athletic opportunities for women; and
23

24 ³ While the standards applicable to motions for
25 reconsideration of final judgments or orders under Rules
26 59(e)(final judgments) and 60(b)(final judgments and orders)
27 technically do not delimit the court's inherent discretion to
reconsider interlocutory orders, the court nonetheless finds them
to be helpful guides to the exercise its discretion.

28 ⁴ The relevant background facts are set forth more fully
in the court's December 8, 2010 Memorandum & Order.

1 (2) a 42 U.S.C. § 1983 claim by individual plaintiffs against the
2 individual defendants for violation of the Equal Protection
3 Clause arising out of the alleged intentional discrimination
4 against plaintiffs or deliberate indifference to a known
5 violation of plaintiffs' rights.

6 Plaintiffs challenge the court's ruling in its December 8,
7 2010 order on the individual defendants' motion for summary
8 judgment to the extent it held as time-barred their claims
9 against the individual defendants (1) for elimination of
10 wrestling opportunities in 2000-2001; and (2) for implementation
11 of a policy that required them to wrestle-off against men in 2001
12 (the "wrestle-off" policy). Specifically, plaintiffs argue that
13 these two alleged instances of discrimination "were part and
14 parcel of [defendants'] systemic discrimination against
15 plaintiffs and other women in the provisions of athletic
16 opportunities" and that defendants' "policy of exclusion was
17 renewed each year." (Pls.' Mot. for Reconsideration &
18 Clarification ("Pls.' Mot.") [Docket #541], filed Apr. 26, 2011,
19 at 1-2.) As such, plaintiffs contend that these acts are
20 actionable, even though they occurred more than two years prior
21 to the initiation of this litigation.

22 The Supreme Court has analyzed whether claims of
23 discrimination have been timely filed by determining whether the
24 acts at issue are discrete retaliatory or discriminatory acts,
25 which "occurred" on the date that such an act "happened," or
26 whether the acts at issue are a continuing violation, which
27 arises from the cumulative effect of individual (and potentially,
28 non-actionable) acts that when taken together form a single

unlawful act. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). Claims based upon discrete acts must be brought within the statute of limitations. Id. at 110-12. Claims based upon a continuing, single discriminatory act may include conduct that falls outside of the limitations period. Id. at 118.⁵

Specifically, with respect to discrete acts, the Morgan Court expressly held that "recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period" are precluded. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002). The Morgan Court defined a "discrete act" of discrimination as one that constitutes a separate, actionable unlawful practice that is temporally distinct. Id. at 114. In the employment context, the Court pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such discrete acts. Id. A cause of action accrues when the discrete, unlawful action occurred. Id. The term "practice" does not convert related discrete acts into a single unlawful practice for the purposes of timely filing. Id. at 111. Indeed, the Court expressly reversed the appellate court's reliance on a continuing violations theory

⁵ Plaintiffs also argue that the holding and reasoning of Morgan is inapplicable to their § 1983 claims because Morgan was "decided based upon the plain language of the Title VII statute itself and its unique administrative enforcement scheme." (Pls.' Mot. at 12.) Plaintiffs' argument runs directly counter to Ninth Circuit authority on this issue. Specifically, the Ninth Circuit has expressly concluded that "[a]lthough Morgan involved Title VII of the Civil Rights Act of 1964, the Supreme Court's analysis of the continuing violations doctrine is not limited to Title VII actions. *It applies with equal force . . . to actions arising under other civil rights laws.*" Cherosky v. Henderson, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003) (emphasis added); see also RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045 (9th Cir. 2002) (applying Morgan in suit arising under 42 U.S.C. § 1983).

1 arising out of "serial violations"; the Court rejected the theory
2 that "so long as one act falls within the charge filing period,
3 discriminatory and retaliatory acts that are also plausibly or
4 sufficiently related to that act may also be considered for the
5 purposes of liability." Id. at 114. As such, although the Court
6 expressly provided that prior acts may be used as "background
7 evidence" in support of a timely claim, discrete acts "are not
8 actionable if time barred, even when they are related to acts
9 alleged in timely filed charges." Id. at 113.

10 Similarly, the Ninth Circuit has expressly held that a
11 plaintiff "cannot challenge conduct that occurred prior to the
12 limitations period merely by alleging that the conduct was
13 undertaken pursuant to a policy that was still in effect during
14 the limitations period." Cherosky v. Henderson, 330 F.3d 1243,
15 1248 (9th Cir. 2003) (finding no continuing violation based on
16 maintenance of an alleged discriminatory policy of denying face
17 masks at work because the plaintiffs' claims accrued "when the
18 policy was invoked to deny an individual employee's request").
19 In Cherosky, the Ninth Circuit reaffirmed its prior conclusion
20 that a "plaintiff's assertion that [a] series of discrete acts
21 flows from a company-wide, or systemic, discriminatory practice
22 will not succeed in establishing the employer's liability for
23 acts occurring outside the limitations period because the Supreme
24 Court has determined that each incident of discrimination
25 constitutes a separate actionable unlawful employment practice."
26 Id. at 1247 (quoting Lyons v. England, 307 F.3d 1092, 1107 (9th
27 Cir. 2002)). As such, even though a discriminatory practice may
28 extend over a period of time or involve a series of related acts,

1 such a practice "remains divisible into a set of discrete acts,
2 legal action on the basis of each of which must be brought within
3 the statutory limitations period." Id. (quoting Lyons, 307 F.3d
4 at 1108); see also Williams v. Giant Food Inc., 370 F.3d 423, 429
5 (4th Cir. 2004) (holding that even if the plaintiff's allegation
6 that the defendant's failures to promote her were part of a
7 larger pattern and practice of discrimination, each failure to
8 promote nonetheless remained a discrete act of discrimination,
9 none of which had occurred within the limitations period);
10 Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 135 (2d Cir.
11 2003). The Ninth Circuit concluded that "it would eviscerate
12 Morgan's premise to circumvent the timely filing requirements
13 merely because a plaintiff alleges that the acts were taken
14 pursuant to a discriminatory policy." Cherosky, 330 F.3d 1248.

15 Conversely, where a plaintiff's claims are based upon the
16 "cumulative effect of individual acts," such claims necessarily
17 involve allegations of repeated conduct. Morgan, 536 U.S. at
18 115. A plaintiff may set forth a claim for unlawful
19 discrimination by showing a systemic policy or practice of
20 discrimination that inflicts injury during the limitations
21 period. Douglas v. Cal. Dept. of Youth Authority, 271 F.3d 812,
22 822 (9th Cir. 2001); see Gutowsky v. County of Placer, 108 F.3d
23 256, 259 (9th Cir. 1997). "The continuing violation doctrine is
24 intended to allow a victim of systematic discrimination to
25 recover for injuries that occurred outside the applicable
26 limitations period, as where an employee has been subject to a
27 policy against the promotion of minorities." Grimes v. City and
28 County of San Francisco, 951 F.2d 236, 238 (9th Cir. 1991). "A

1 systemic violation claim requires no identifiable act of
2 discrimination in the limitations period, and refers to general
3 practices or policies." Douglas, 271 F.3d at 822. However, the
4 continuing violations doctrine does not give "new life" to time-
5 barred discrete acts, such as termination related claims in the
6 employment context, "even where the effects of the termination
7 are not . . . immediately felt." Grimes, 951 F.2d at 238.

8 In this case, the court concluded that plaintiffs' § 1983
9 claims included allegations based upon both discrete acts and a
10 systemic violation. The court held, in accordance with Supreme
11 Court and Ninth Circuit precedent, that discrete discriminatory
12 conduct outside of the statute of limitations period was not
13 independently actionable, while systemic discrimination that
14 occurred both during and outside of the limitations period was
15 actionable. Specifically, the court concluded that plaintiffs'
16 challenges arising from the elimination of women's wrestling
17 opportunities in 2000-2001 and the implementation of the
18 "wrestle-off" policy in 2001 were discrete acts akin to a
19 termination, failure to promote, denial of transfer, or refusal
20 to hire. These two acts were finite, divisible instances of
21 alleged discrimination that became actionable at the time they
22 occurred. Because such acts occurred outside the applicable
23 statute of limitations, the court held that these acts were time-
24 barred and not independently actionable.⁶ The court noted,

25
26 ⁶ The court also noted that its analysis regarding the
27 University's implementation of the "wrestle-off" policy might be
28 different if there was any evidence that defendants continued to
use the alleged discriminatory policy within the limitations
period. In Lewis v. City of Chicago, the Supreme Court held that
a disparate treatment claim under Title VII could be based on the

1 though, that such conduct could be used as "background evidence"⁷
2 in support of a timely claim. See Morgan, 536 U.S. 113.

3 However, the court held that plaintiffs' challenges to the
4 equal accommodation of athletic opportunities to women was a
5 systemic violation that allegedly occurred each and every day
6 plaintiffs were students at the University.⁸ Accordingly, this
7 claim was timely filed.

8
9 subsequent application of an alleged discriminatory policy that
10 had been adopted outside of the limitations period. 130 S. Ct.
11 2191, 2197 (2010). In Lewis, the plaintiffs challenged selection
12 of firefighters based upon the results of an allegedly
13 discriminatory test administered in 1995. While it was
14 undisputed that a challenge to the administration of the test and
15 the selection of the first round of applicants from the scores
16 was time-barred, the Court held that the use of those same test
17 scores to select applicants over the next six years constituted
18 new actionable violations. Id. at 2199.

19 However, in this case, as noted in the December 8, 2010
20 Memorandum and Order, plaintiffs set forth no allegations or
21 evidence that defendants ever applied the same allegedly
22 discriminatory policy to plaintiffs after the try-outs in the
23 Fall 2001. Accordingly, implementation and application of the
24 allegedly discriminatory wrestle-off policy to plaintiffs in Fall
25 2001 is time-barred.

26
27 ⁷ For example, in this case, plaintiffs' § 1983 claims
28 arise out of an alleged systemic policy of unequal treatment of
women in the provision of athletic opportunities that spanned for
decades. Plaintiffs claim that the individual defendants
perpetuated this policy intentionally or with deliberate
indifference to plaintiffs' rights. The individual defendants'
conduct with respect to plaintiffs' involvement in wrestling may
be relevant evidence of their intent or knowledge regarding the
provision of athletic opportunities to women as well as relevant
evidence of the existence of a policy of unequal treatment.

29
30 ⁸ In their opposition defendants expressed confusion with
respect to the term "systemic violation" as applied to individual
defendants as opposed to an entity defendant. As set forth in
the court's December 8, 2010 Memorandum & Order, in order to
demonstrate an Equal Protection violation, plaintiffs must
establish that each defendant either intentionally discriminated
against each plaintiff or was deliberately indifferent to known
discrimination against plaintiff. In this case, the alleged
discrimination is alleged to have occurred through a systemic
policy of unequal athletic opportunities.

1 Plaintiffs' assertion that the law of the case and the Ninth
2 Circuit's mandate command a different conclusion is without
3 merit. As the court noted in its December 8, 2010 Memorandum &
4 Order, the Ninth Circuit did not address the court's rulings
5 regarding plaintiffs' claims based upon discrete acts; rather, it
6 simply affirmed the court's rulings regarding the applicable
7 statute of limitations for systemic violations. See Mansourian,
8 602 F.3d at 973-74. The Ninth Circuit noted that "[a]
9 university's ongoing and intentional failure to provide equal
10 athletic opportunities for women is a systemic violation" and
11 because "plaintiffs were students and therefore subject to the
12 policy that allegedly discriminated on the basis of sex at the
13 time they filed their complaint, their § 1983 claim is not time-
14 barred." Id. at 974. Notably, the Ninth Circuit was silent with
15 respect to allegations relating to the elimination of women's
16 wrestling and to the implementation of the "wrestle-off" policy.
17 As such, the court is bound to the Ninth Circuit's holding (and
18 concludes in accordance with its own prior ruling) that
19 plaintiff's Equal Protection claim against defendants arising
20 from the alleged systemic, ongoing and intentional failure to
21 provide equal athletic opportunities for women is not time-
22 barred. However, because the Ninth Circuit made no reference to
23 the discrete acts alleged in the complaint, the Ninth Circuit's
24 mandate does not require the court to conclude that plaintiffs'
25 claims arising from discrete acts are timely.⁹

26
27 ⁹ Plaintiffs also erroneously assert that the court
28 "partially reversed itself" in holding that discrete acts were
time-barred. Presumably, plaintiffs' rely on the court's May 6,
2004 Memorandum & Order, denying defendants' motion to dismiss

1 While the court's December 8, 2010 Memorandum & Order relied
2 upon the Supreme Court's decision in Ledbetter v. Goodyear Tire &
3 Rubber Co., Inc., 550 U.S. 618, 628 (2007), any ambiguity
4 regarding the applicability of the Court's holding or reasoning
5 in light of the retroactive application of the Lilly Ledbetter
6 Fair Pay Act of 2009 (the "FPA") does not impact this court's
7 analysis regarding the timeliness of plaintiffs' claims. As set
8 forth, *supra*, the Supreme Court's decision in Morgan as well as
9 Ninth Circuit precedent supports the distinction between time-
10 barred, discrete acts and actionable, continuous violations.
11 Moreover, the purpose of the FPA "was to reinstate the law
12 regarding timeliness of pay compensation claims as it was prior
13 to the Ledbetter decision," such that each paycheck reflecting
14 the allegedly discriminatory decision gives rise to a distinct
15 cause of action. Mikula v. Allegheny Cnty of Pa., 583 F.3d 181,
16 185 (3d Cir. 2009); see Noel v. The Boeing Co., 622 F.3d 266, 271
17 (3d Cir. 2010); see also Groesch v. City of Springfield, Ill.,
18 635 F.3d 1020, 1026 (7th Cir. 2011). Because the FPA narrowly
19 addresses pay compensation claims in employment discrimination
20 cases, its passage does not change the court's analysis regarding
21 timely filing in this case.

22
23
24 plaintiffs' Equal Protection claim on statute of limitations
25 grounds. However, the court expressly noted, as a "final point
26 of clarification" with respect to both plaintiffs' Title IX and §
27 1983 claims, that it did not determine "whether any portion of
28 said claims is otherwise barred by the applicable statute of
limitations"; rather, it directed that such arguments should be
addressed on a motion for summary judgment. (Mem. & Order
[Docket #25], filed May 6, 2004, at 13-15 (expressly
incorporating the court's Title IX analysis into its § 1983
analysis).

1 Finally, both plaintiffs and defendants have expressed
2 confusion about the import of the court's rulings regarding the
3 statute of limitations as applied to plaintiffs' § 1983 claims.
4 As the court has reaffirmed in this order, the alleged discrete
5 acts relating to the elimination of women's wrestling and the
6 implementation of the "wrestle-off" policy are not actionable.
7 However, such acts may be used in the liability phase of trial as
8 relevant evidence of, *inter alia*, (1) the existence of the
9 alleged discriminatory policy; (2) each individual defendant's
10 knowledge of the alleged discriminatory policy; and/or (3) the
11 intent of each individual defendant with respect to implementing
12 or perpetuating the alleged discriminatory policy. Similarly,
13 because the alleged discrete acts outside the limitations period
14 are not actionable, plaintiffs may not recover damages traceable
15 only to those acts; rather, plaintiffs are limited to recovery
16 for damages traceable to the alleged discriminatory policy.
17 However, those alleged discrete acts may also be relevant
18 evidence to determine the measure of damages incurred as a
19 consequence of the alleged discriminatory policy.¹⁰

20
21 ¹⁰ For example, if the court finds the individual
22 defendants liable for Equal Protection Clause violations, the
23 measure of damages may include the value of benefits received by
24 varsity athletes. In order to recover that value, plaintiffs
25 could demonstrate that a women's varsity wrestling program would
26 have been offered but for defendants' unconstitutional conduct
27 related to the policy of discrimination. Prior existence of such
a program would be relevant evidence in support of this claim for
damages. However, defendants could present evidence that women's
wrestling would never have been offered or, if in existence,
would have been eliminated regardless of any constitutional
violations. This inquiry, though, is relevant to the amount of
damages, not liability.

28 The court provides this example as merely one way in which
the "discrete acts" may be relevant to the issue of damages. It

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration and/or clarification is DENIED.

IT IS SO ORDERED.

DATED: May 18, 2011



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

is not set forth as a limitation on either plaintiffs' or defendants' theory of the case.